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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 342

PAUL E. KERN, a holder of Kentucky Fuel Gas Corporation First Mortgage Bonds and 6½% Debentures,
Petitioner,

vs.

BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION and of KENTUCKY FUEL GAS CORPORATION, THE COLUMBIA GAS SYSTEM, INC., et al.,
Respondents.

PETITION FOR REHEARING

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Dated: November 1, 1957.

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PETITION FOR REHEARING

Petitioner, Paul E. Kern, prays that the Court reconsider the denial on October 14, 1957 of his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit herein, and that the writ of certiorari be issued as requested.

The conflict between the decision below on the one hand, and the decisions of this Court [306 U. S. 307 (1939)] and of the Court of Appeals for the Tenth Circuit [113 F. 2d 266 (1940)] in the *Deep Rock* reorganization on the other, was clearly recognized by the majority below [241 F. 2d 374, 383]. Though counsel for respondent denied existence of that conflict in their response here, they had explicitly recognized it in their briefs below not only once but twice (Brief, p. 31; Reply brief, pp. 7-8). That the petition

presents an important question in the administration of the Bankruptcy Act which was improperly decided below was urged upon this Court by the Securities and Exchange Commission as well as by petitioner. In the circumstances, and with appropriate deference since we cannot know the reason, we attribute this Court's denial of certiorari not to its having concluded that there is no conflict, or that the issue is not worthy of review here, but to the fact that the decision below is not a final judgment. It is to this ground that this petition is addressed.

The disinclination of this Court to grant certiorari to review decisions which are not final judgments rests in fundamental part on a sound principle which we do not dispute—that the issues raised by a petition for review of a non-final judgment may in one way or another disappear in subsequent proceedings in the courts below. In such circumstances, denial of certiorari serves to relieve this Court of the obligation to decide an issue which may eventually prove unnecessary to the disposition of the case.

We respectfully submit, however, that in this case, although the decision below is not a final judgment, the issue on which review has here been sought will not evaporate in the subsequent proceedings. Because this point was not made clear in the petition for certiorari, it is urged here as a basis for reconsideration of the denial of the writ.

Essential to any plan of reorganization which could possibly be proposed in this case is the question of granting or denying recognition to the claims of the public holders of Kentucky Bonds and Debentures for post-bankruptcy interest. That question will necessarily survive the resolution of any and all other issues which are or may be injected into these proceedings. Moreover, since the dollar amount of the post-bankruptcy interest involved is almost twice as much as the amount of principal involved, and since the Kentucky public creditors

have been unequivocally denied any part of that interest, the ruling below leaves no room for compromise.

Accordingly, a new plan predicated upon the denial of such interest, which the Courts below directed the Trustees to prepare, will inevitably bring back to this Court the issue now presented in the petitions for certiorari, in all respects the same except that it will then be embodied in a plan approved and confirmed in final judgment. The propriety of raising the issue here at that time is beyond dispute. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916); *City of Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 74-75 (1941); *White* v. *Higgins*, 116 F. 2d 312, 317 (1st Cir., 1940). In the circumstances, the denial of certiorari at this time will not serve, as might be true in many other cases of non-final judgments, to remit the proceedings to the District Court with the possibility of the issue on which certiorari was sought dropping out of the case. This eliminates a fundamental premise upon which this Court's denial of certiorari to review non-final judgments normally rests.

To require the issue to ripen into a final judgment in the courts below before this Court will review it is peculiarly at odds with orderly judicial administration in this proceeding. The process of plan formulation, approval and confirmation is a lengthy one. Whether we are right or whether Columbia is right upon the merits, that process must in the present posture of this case be gone through once again. If we are right, the failure to review at this time will require that it be gone through twice. The need for the exercise of this Court's discretionary power now is accentuated by the fact that, although issues as to Columbia's participation in this reorganization vis-a-vis the public creditors of the System have been before the Court below five times, on no two occasions has that Court resolved those issues on consistent premises. Indeed, on

aspects basic to the question here presented that Court has directly contradicted itself in succeeding decisions.*

In the light of this history, we respectfully submit that considerations of sound judicial administration dictate the definitive resolution of the post-bankruptcy interest question by this Court now, rather than its further postponement.

CONCLUSION

We respectfully request that this Court reconsider its denial of the petition for certiorari herein and grant the writ as prayed for.

Respectfully submitted,

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* E.g., in 1941 the Court below directed that Columbia's claims be rejected *in toto* (122 F. 2d 223). In 1945 it held that it had been without power to reject, and therefore modified its previous decree to provide for subordination only (151 F. 2d 461, 470; 153 F. 2d 101). In the decision here sought to be reviewed, it held that it had had "authority" to reject Columbia's claims, but that having "declined" in 1945 to do so, in 1957 it was bound by the "bankruptcy rule" to deny post-bankruptcy interest to the Kentucky public creditors (241 F. 2d 374, 382).

Certificate

I hereby certify that the foregoing petition is presented in good faith and not for purposes of delay, and is restricted to grounds specified in Rule 58 of the Rules of this Court.

November 1, 1957.

CARLOS L. ISRAELS,
Counsel for Petitioner.